United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7347

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES WYPER, JR.

vs.

PROVIDENCE WASHINGTON INSURANCE COMPANY

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF PLAINTIFF-APPELLANT

PAUL W. ORTH of
HOPPIN, CAREY & POWELL
266 Pearl Street
Hartford, Conn. 06103

TABLE OF CITATIONS

PLAINTIFF'S REPLY ARGUMENT

Defendant has in its brief perpetuated two fundamental mistakes: (1) it has persistently viewed the evidence in the light most unfavorable to plaintiff, and (2) it has insisted that plaintiff is not entitled to significant judicial review of its biased determination of its own case.

(1) Plaintiff's brief (p. 12) tried to indicate that he relied little on his or his ex-wife's testimony. Plaintiff had medical evidence of chronic alcoholism, which alone might be enough to establish incapacity to be continuously effective as president. His case was bolstered by the testimony of fellow officers, and the strong inferences of incapacity which could be drawn from the timing of the Board's encouragement of his "resignation" and from his quick signing off of valuable pension rights. Defendant, however, now ignores this solid evidence and bases its case (brief, pp. 2, 3, 7, 8) on this alcoholic's alleged "admissions" and his unfavorable interpretations of other testimony, *largely elicited on cross-examination.* Defendant forgets it was dealing with a sick person years after the events in question and that Dr. Nichols indicated that alcoholics tend to cover up and say they can handle the situation. (TR 109-111) Inconsistencies would be expected, yet defendant ignores this and plaintiff's rehabilitative testimony on redirect examination — *which the jury could have accepted,* especially since it was consistent with other evidence. For instance, on redirect Mr. Wyper indicated that he made a mistake in answering a question in the morning and that he was *not* capable of running the company during the last month, and later that his "shape" in April was "not good". (IV TR 21-27, 35)

(2) For plaintiff's contract to be non-illusory, defendant retained no real discretion *as to him.* To do justice in this case, "may" (be retired . . .) in defendant's plan should be interpreted as "shall" or "must". *Black's Law Dictionary* (4th Ed) 1131; *cf. Rochester Corporation v. Rochester,* 450 F.2d 118, 121 (4th Cir. 1971) (vested rights under pension plan, which could not be amended retroactively); and *Dierks v. Thompson,* 295 F. Supp. 1271, 1278 (D.R.I. 1969) (liberal

construction of pension plan[1]); rev'd on other grounds, 414 F.2d 453 (1st Cir. 1969). Even to the extent that defendant retains any discretion in regard to the existence or extent of this plaintiff's incapacity, plaintiff should prevail under each of three views:

1. The incorrect "no honest tribunal" *dictum* of *Matthews v. Swift & Co.*, 465 F.2d 814, 821 (5th Cir. 1972), *provided* the evidence is viewed in a light favorable to him;

2. The usual administrative review standard of "arbitrary, fraudulent, or in bad faith", which, however, presumes an impartial tribunal and contains the danger of rendering the contract illusory; *cf. Golden v. Kentile Floors, Inc.*, 512 F.2d 838, 847, 849 (5th Cir. 1975) (no bad faith regarding anti-competitive provision of pension plan); and

3. The "reasonable judgment" test, which this Court should adopt because it allows a full review of the lack of objectivity and reasonableness of defendant's determination, action and inaction, and gives full force to bargained-for contractual rights regarding service and pension.

This last test is the equivalent of the "reasonable expectations" requirement of the Connecticut cases cited on page 24 of plaintiff's brief, and adopts the fundamentally fair approach expressed in *Ellis v. Emhardt Mfg. Co.*, 150 Conn. 501, 504; 191 A.2d 546 (1963):

> "It is a well recognized principle of natural justice that a man ought not to be a judge in his own case. Irrespective of any proof of bias or prejudice, the law presumes that a party to a dispute is not disinterested and does not possess the impartiality so essential to proper judical action regarding it . . . . . ."

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[1]The court cited, as to the construction of insurance contract against the company, *Providence Washington Insurance Co. v. Lovett*, 119 F. Supp. 371, 375 (D.R.I. 1953). Thus, there is indication that, if a Connecticut court — and hence a federal court in Connecticut — first looked under its conflict rules to Rhode Island, it would find authority for a liberal construction of the plan in favor of plaintiff *and* the "good faith" requirement of *Hanaford v. Steven & Co.*, 39 R. I. 182; 98 Atl. 209 (1916), and thus that there would be no apparent inconsistency with the probable result under Connecticut law.

In *Russell v. Princeton Laboratories, Inc.*, 50 N.J. 30, 231 A.2d 800, 805 (1967), which cites both Connecticut cases, the court said the employer "must stay within the bounds of reasonable judgment", and held that there was no voluntary resignation and that the pension committee's decision was factually unreasonable. In this case, defendant effectively outlasted Mr. Wyper, disregarded the contract and its own knowledge, and worked an impermissible forfeiture of his rights.

Respectfully submitted

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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 1975, I mailed, first-class postage prepaid, three (3) copies of Plaintiff's Reply Brief in the above entitled matter to George Muir, Esquire, Attorney for Defendant.

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